Supreme Court, U.S.
FILED
DEC 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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LILLIAN JONES and JOSEPH JONES, INDIVIDUALLY AND AS CO-ADMINISTRATORS FOR THE ESTATE OF JOSEPH CLARK, DECEASED,

Petitioners,

vs.

JAMES L. WELLS, SHERIFF; MARION COUNTY SHERIFF'S DEPARTMENT; MARION COUNTY SHERIFF'S MERIT BOARD; BOARD OF COMMISSIONERS OF MARION COUNTY; WILLIAM HUDNUT, CHIEF ADMINISTRATOR OFFICER OF MARION COUNTY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BRIEF OF ALL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioners urge one question for review: Whether prejudicial error resulted from the trial court's granting of a directed verdict for Respondents on one of Petitioners' theories of relief.

PARTIES

All parties are identified in the caption.

DECISION BELOW

These Respondents accept the Petitioners' version of the decision below.

JURISDICTION

These Respondents accept the Petitioners' statement of jurisdiction.

STATEMENT OF THE CASE

These Respondents accept Petitioners' statement of the case. However, Petitioners' statement of the case implies a total failure on the part of the municipal Defendants to provide police training to Defendant Riggs. The undisputed evidence was clearly to the contrary. Defendant Riggs received 400 hours of police training at the Indiana Law Enforcement Academy prior to assuming his duties as a deputy sheriff. Defendant Riggs' training was in excess of that mandated by Indiana state law.

ARGUMENT REGARDING QUESTION PRESENTED

The issue correctly framed is whether the Court of Appeals erred in affirming the trial court's granting of a directed verdict to the municipal Defendants where the jury properly found that the Defendant police officer had not violated Petitioners' decedent's constitutional rights.

To hold a municipality liable under §1983 a party must prove that the municipality "... subject[ed], or cause[d] [him] to be subjected," to the deprivation of a constitutionally protected right. 42 U.S.C. §1983. As this Court has repeatedly explained, this means that an official policy or custom must be shown to be the cause of the deprivation of constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445 (1981); *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427 (1985). Under *Tuttle*, the element of causation contains two components: first, the existence of a municipal policy or custom; and second, a causal connection — an "affirmative link" — between the policy and the constitutional deprivation. *Id.*, ___ U.S. at ___, & n.8, 105 S.Ct. at 2436 & n.8.

Here, the jury verdict in favor of Defendant Riggs could only have been based upon a finding that no constitutional violation existed since the jury was not instructed on any immunity defenses.

As the Court of Appeals stated in note five:

> [5] A plaintiff must show both state action and impairment of a constitutionally protected right to recover damages under section 1983. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Noting that Riggs' theory of the case never involved an immunity defense, and that the jury received no instructions on the subject, the general verdict in favor of Riggs, a state actor, must imply that the jury found no constitutional violation.

Appendix A at 8.

Since no constitutional violation occurred, the causal connection or "affirmative link" required under *Monell* and its progeny is clearly absent. As this Court recently reiterated in *Tuttle, supra*, "a constitutional right — had to be violated to establish liability under §1983." *Id.*, ___ U.S. at ___ n.4, 105 S.Ct. at 2433 n.4.

Respondents would also point out that at trial Petitioners made no attempt to show that the alleged wrongful conduct of Defendant Riggs was one in a series of similar incidents of police misconduct. Rather, Petitioners focused exclusively upon the facts of this accidental shooting. Even if the jury had determined that Defendant Riggs had used excessive force, the question of municipal liability presented here would be identical to that in *Tuttle*: "Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. §1983." *Id.*, ___ U.S. at ___, n.2, 105 S.Ct. at 2431 n.2.

This issue was expressly answered in *Tuttle*:

> Here the instructions allow the jury to infer a thoroughly nebulous policy of "inadequate training" on the part of the municipal corporation from a single incident described earlier in this opinion, and at the same time sanctioned the inference that the policy was the cause of the incident. Such an approach provides a means for circumventing *Monell's* limitations altogether. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.

___ U.S. at ___, 105 S.Ct. at 2436.

The evidence at trial did not establish an unconstitutional policy, nor did it establish a pattern of similar incidents of police misconduct. Therefore, Petitioners never established the requisite causal connection or "affirmative link". The trial court's granting of a directed verdict was proper, and the question presented by Petitioners is not one as to which certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued February 28, 1985

September 4, 1985

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

LILLIAN JONES & JOSEPH JONES, Individually and as Co-Administrators of the Estate of Joseph Clark, Deceased, *Plaintiffs-Appellants,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83-3075 vs.	)	
ERNEST C. RIGGS, *Defendant-Appellee.*	)	No. 80 C 915 JAMES E. NOLAND, *Judge.*

ORDER

Plaintiffs Lillian Jones and Joseph Jones, acting individually and as co-administrators for the estate of Joseph Clark, brought this suit against Deputy Sheriff Ernest Riggs and various officials associated with the Marion County, Indiana, Sheriff's Department (the "County defendants"). Plaintiffs seek money damages for the death of Clark, who died when Deputy Sheriff Riggs unintentionally shot him in the course of a misdemeanor arrest. The case proceeded to trial in three counts, the first of which

alleged that Riggs violated Clark's constitutional rights. 42 U.S.C. §1983. The second count raised a similar claim against the County defendants, alleging that their inadequate training of police officers and lack of policy governing the withdrawal of weapons contributed to Clark's death. The final count consisted of a pendent Indiana state wrongful death action. At the close of plaintiffs' case, the trial court directed a verdict in favor of the County defendants. A jury later returned a general verdict in favor of Riggs on the first and third counts. On appeal plaintiffs argue that the trial court erred in various evidentiary rulings and in directing verdicts in favor of the County defendants. We affirm.

I. Counts I and II: The Federal Constitutional Claims

In reviewing plaintiffs' evidentiary claims, "we bear in mind that decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court and will not be reversed on appeal unless they constitute a clear abuse of discretion." *Ellis v. City of Chicago*, 667 F.2d 606, 611 (7th Cir. 1981). *See also Gorby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015, 1018 (7th Cir. 1984); *United States v. Cannon*, 715 F.2d 1228, 1232 (7th Cir. 1983); *United States v. Brown*, 688 F.2d 1112, 1115 (7th Cir. 1982). Plaintiffs argue that the court erred in granting defendants' motion *in limine* to prevent, among other things, any discussion of a decision by the Sheriff's Merit Board (the "Board") to suspend Riggs for six weeks without pay for violating its Rule 367(E)[1] governing use of deadly

[1] That rule provides:

> The use of deadly force against persons by deputy sheriffs and/or county policemen shall be restricted to the following:
>
> 1. In defense of himself or others, when assaulted and in reasonable danger of serious bodily harm, and when there is no apparent means of subduing the person committing the assault.

(footnote continued on following page)

force[2]. They further claim that even if the court correctly granted the protective order in the first instance, the evidence should have been admitted when defendants later "opened the door" by eliciting testimony from the County Sheriff about his restrictive interpretation of that Rule.

The trial court justified its decision to exclude introduction of the Board decision by noting that "It's based on a different — their decision is made and their hearing was held in regard to a different basis than what is before the court in this legal action . . . ." (Tr. 244). In other words, the court either concluded that the evidence had no relevance to the issue of whether Riggs or the County defendants violated Clark's constitutional rights, Fed. R. Evid. 401, or that the danger of unfair prejudice or confusion by a jury, unfamiliar with the Board's process, focus of inquiry, or standard of proof, outweighed any probative value, Fed. R. Evid. 403.

(footnote continued from previous page)

2. As a last resort when effecting an arrest of a fleeing felon when the felony is of the type which normally causes or threatens death or serious bodily harm or which involves the breaking and entering of a dwelling place or other place where human beings live or are employed and when arresting officer reasonably believes that the arrest cannot be otherwise effected.

3. An officer lawfully arresting a misdemeanant may use all the force that is reasonably necessary to accomplish the arrest short of deadly force as qualified by paragraph one (1) above.

4. Any police employee who officially discharges a firearm, excluding qualification, matches, or individual practice, must submit a written report to the Sheriff explaining such incident.

[2] The Board found as follows:

In reviewing the evidence given in connection with the shooting of Joseph Clark on the evening of October 6, 1979, the Marion Co. Sheriff's Merit Board finds that there was force in violation of Rule 367. However, we believe that the use of this force was unintentional, based on circumstances surrounding the incident, and that the firing of the weapon, resulting in death, was unintentional.

Because of the judgment used in not employing other means in subduing the prisoner, it is our unanimous finding that Deputy Riggs be suspended for a period of six weeks without pay.

R. 21, Exhibit E.

We begin our evaluation of plaintiffs' first evidentiary claim by reviewing the allegations in their complaint and the court's instructions to the jury. Plaintiffs alleged that Riggs "intentionally, recklessly, or negligently" deprived Clark and plaintiffs of various rights, privileges and immunities, including, but not limited to,

> the right to life, liberty and property, the right to have children and a family, the right to the expectation and support from one's children, the right to be secure in one's person and effects, the right to be free from cruel and unusual punishment, the right to the equal protection of the laws, the right to be free from the unreasonable exercise of the police power in the search and seizure of one's person, house, papers, and effects, and the right to due process of law.

The trial court in its instructions characterized the complaint as alleging "that Joseph Clark was deprived of his life and liberty under color of state law or regulation in that Deputy Sheriff Riggs either intentionally, recklessly *or negligently* used unlawful force in his arrest." (Tr. 720). (Emphasis added). It later instructed the jury that "[i]n order to prove [their] claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence ... [t]hat Deputy Sheriff Riggs knowingly or wantonly caused the death of Joseph Clark...." (Tr. 727). A "knowing" act was defined as an act "done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." A "wanton" act was defined as an act "done in reckless disregard or indifference to, the rights of one or more persons, including the injured person." (Tr. 728). Thus, despite plaintiffs' acknowledged allegation of negligent deprivation of constitutional rights, the court instructed the jury to find for plaintiffs only if Riggs' conduct was intentional or reckless. Constitutional rights can be impaired through the negligent acts of others, *see Parratt v. Taylor*, 451 U.S. 527, 547 548 (1981) (Powell, J., concurring); *Crawford v. Edmonson*, No. 84-2371, slip op. at 12-14 (7th Cir. June 3, 1985). Plaintiffs, however, never

specified the constitutional provisions violated by Riggs through mere negligence. In any event, plaintiffs failed to complain about the instruction, and have waived any challenge to its contents or omissions. Even if the Board's finding that Riggs used deadly force in violation of Rule 367 indicates a breach of duty relevant to an inquiry into negligence, it does not go to the question of intent or recklessness focused on by the court. We find no abuse of discretion in the court's initial decision to prevent introduction of the Board's finding, which was irrelevant to the circumscribed issues before the jury. Moreover, the trial court reasonably could have concluded that introduction of the finding may have misled or prejudiced the jury by tempting it to equate the Board's finding of a Rule violation with Riggs' violation of Clark's constitutional rights.

Plaintiffs' second contention is more troublesome. Defendants, on cross-examination, asked the County Sheriff whether Rule 367 governing use of deadly force "goes to when you may actually intentionally pull the trigger of your gun..." and not to when an officer merely can remove a gun from his or her holster (Tr. 267). The sheriff answered affirmatively. Since plaintiffs conceded that Riggs did not intentionally fire at Clark, a logical inference to be drawn from this statement (or rather misstatement) of law was that Riggs did not violate the Rule. Defendants knew at the time that the Board had found that Riggs did violate the Rule even though he did not intend to pull the trigger and shoot Clark. Plaintiffs argue that defendants "opened the door" to introduction of the Board's finding by calling into issue the legal reach of Rule 367.

Plaintiffs, however, waived any right to challenge the previous decision of the court to grant defendant's motion *in limine*. The sheriff's damaging testimony did not come as a surprise to plaintiffs. Defendants solicited a yes or no answer to a carefully crafted and detailed question. Plaintiffs had an opportunity to object and prevent the

information from reaching the jury, yet chose to remain silent. Only after defendants completely finished cross-examining the witness did plaintiffs approach the bench. And even then they did not object to the admission of the sheriff's statement. Instead, they argued that the statement "opened the door" to their admission into evidence of the Board's finding. Plaintiffs later failed to seek a curative jury instruction on either the weight to attach to the sheriff's statement or the appropriate inferences to be drawn from it.

Plaintiffs showed no concern for the prejudicial impact of the statement, and viewed it only as an opportunity to introduce the Board's finding in rebuttal. To the extent plaintiffs were concerned about the sheriff's misstatement of the scienter required to make out a violation of the Rule, they should have called the error to the attention of the court and jury, and presented a correct statement of the law. While introduction of the Board finding was one way to set the record straight, it was not the exclusive method. In any event, introduction of an irrelevant misstatement of law does not open the floodgates for admission of any and all rebuttal evidence, irrespective of that evidence's relevance to the issues to be decided. The unfortunate answer given by the sheriff did not make the Board's finding any more relevant to the question of whether Riggs intentionally or recklessly violated the constitutional rights of Clark. The trial court initially refused to introduce the Board's finding because (1) it lacked relevance or (2) its potential for unfair prejudice or confusion outweighed any probative value. The sheriff's misstatement of law could not — and did not — render the Board finding any more relevant to the issue of violations of Clark's constitutional rights. The federal Constitution, and not Rule 367, defines the scope of liability under section 1983. Neither did the statement shift the balance between probative value and unfair prejudice. If none of the factors relevant to the court's initial decision to

exclude the finding changed as a result of the sheriff's statement, there was no reason to alter that decision.[3]

Plaintiffs next argue that the court violated Fed. R. Evid. 404 when it admitted evidence concerning Riggs' character. Plaintiffs earlier had introduced expert evidence concerning the skills Riggs should have possessed when he attempted to arrest Clark. In particular, an expert stated that Riggs should have possessed

> interactive skills, how to talk to the drunk and how to deal with the drunk, and everything again is designed to protect life ... so the skills are verbal, and when those fail, the skills become the use of force that is less than deadly, the use of those kind of pain compliance holds we talked about, the use of the baton. Tr. 387-389.

In response, Riggs' supervisors testified that he was well-mannered and low key, given to "going the extra step to

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[3] Defendants argue that the Board's report is inadmissible not only because it is irrelevant, but also because it is excludable as a remedial measure taken subsequent to allegedly negligent conduct. Fed. R. Evid. 407. Plaintiffs reply that an exception applies. Rule 407 promotes "a social policy of encouraging, or at least not discouraging [people] from taking steps in furtherance of added safety." Advisory Committee's Note. This basis for exclusion does not apply when the party taking remedial measures suffers no prejudice through introduction of the evidence as an admission of fault. Although the Board originally was a party defendant, it was dismissed out on a directed verdict. Regardless of whether the Board's report is properly characterized as a "remedial measure," Rule 407 cannot be invoked to prevent the report's introduction into evidence against Riggs because the Board suffers no prejudice. *See, e.g., Lolie v. Ohio Brass Co.*, 502 F.2d 741, 744 (7th Cir. 1974); *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883, 889 (5th Cir. 1983). *See also* 10 Moore's Federal Practice §407.05 (1985).

Evidence of subsequent repairs "may be admitted for any purpose that does not require an inference to the negligence or culpable conduct of the repairer...." Wright and Graham, Federal Practice and Procedure, Evidence §5290 and n.2 (1980). Since plaintiffs do not seek to introduce the report as evidence of the Board's negligence, Rule 407 would not require exclusion of the evidence if otherwise admissible. Of course, being irrelevant, the report is not otherwise admissible.

communicate to avoid a problem" (Tr. 492), "very good with the public" (Tr. 539), and able to "handle anything." (Tr. 540). While "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion..." Fed. R. Evid. 404(a), the complained-of evidence was not admitted to show that Riggs was well-mannered on the night of the tragic shooting, that he bent over backwards to communicate with Clark, or that he "handled" the situation well. Rather, the testimony rebutted the insinuation of plaintiffs' expert that Riggs lacked necessary police skills.[4] Such a use is proper. *Cf. Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *United States v. Vitale*, 728 F.2d 1090 (8th Cir. 1984).

Plaintiffs also argue that the court erred in admitting evidence about the dangerous character of the apartments where the shooting occurred. While we question the probative value of this evidence to a determination of whether Riggs intentionally or recklessly violated Clark's civil rights, the information was not stressed and played little of a role, if any, in resolution of the dispute. Any error in its introduction was harmless.

Last, given our conclusion that the jury properly found that Riggs did not violate Clark's constitutional rights,[5] it follows that the County defendants could not have done so

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[4] Although the dissent is correct in noting that the testimony regarding Riggs' lack of training and police skills was relevant to the claim against Marion County, the evidence was also probative of Riggs' own intentional, reckless or negligent conduct (see Tr. 397), thus permitting introduction of character evidence in rebuttal.

[5] A plaintiff must show both state action and impairment of a constitutionally protected right to recover damages under section 1983. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Noting that Riggs' theory of the case never involved an immunity defense, and that the jury received no instructions on the subject, the general verdict in favor of Riggs, a state actor, must imply that the jury found no constitutional violation.

vicariously. *See Richardson v. City of Indianapolis*, 658 F.2d 494, 500 (7th Cir. 1981). Accordingly, we affirm the jury verdict and the directed verdict with respect to plaintiffs' civil rights action under 42 U.S.C. §1983.

II. Count III: The Pendent Indiana State Wrongful Death Action

Plaintiffs allege that Riggs violated both a statute[6] and a departmental regulation (Rule 367) governing use of deadly force, that such violations in and of themselves demonstrate negligence, and that this negligence entitles recovery of damages for the wrongful death of Clark. Indiana's wrongful death statute permits recoveries based on negligent conduct that leads to death. IND. CODE §34-1-1-2. Violations of safety statutes or regulations create a rebuttable presumption of negligence on the part of the violator. *Bohrkaste v. City of Terre Haute*, 470 N.E.2d 738, 744-745 (Ind. App. 1984). Plaintiffs argue that the trial court erred by failing to admit the Board's report as proof of negligence.

The Indiana Court of Appeals considered this precise issue in *Warren v. City of Indianapolis*, 375 N.E.2d 1163 (Ind. App. 1978). The administrator of the estate of a man who died from an overdose of barbituates brought a wrongful death action against the city of Indianapolis and a police officer who left the dying man in a grassy field to "sleep it off," mistakenly believing the man merely to be drunk. The trial court granted defendants' motion *in*

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[6] That statute provides, in relevant part:

> A law enforcement officer is justified in using reasonable force if he reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if he reasonably believes that that force is necessary:
>
> (1) To prevent serious bodily injury to himself or a third person or the commission of a forcible felony; or
>
> (2) To effect an arrest of a person who has committed or attempted to commit a felony.

IND. CODE §35-41-3-3.

limine to exclude any reference to the results of an internal police disciplinary proceeding brought against the officer for violation of departmental regulations. Plaintiffs appealed from an adverse judgment, arguing, *inter alia*, that the results of the proceeding were erroneously excluded. Drawing an analogy from the rule prohibiting introduction into evidence of a prior criminal conviction (following trial) in a civil suit arising out of the same incident, the appellate court held that "admission of this evidence was irrelevant and properly refused." *Id.*, 375 N.E.2d at 1165.

The jury, and the jury alone, has responsibility to decide whether Riggs breached a duty of care owed to Clark. The Board's opinion about the existence of a breach has no bearing on the jury's resolution of this ultimate issue — it does not make it more or less likely that Riggs violated the Rule. The record does not reveal the procedures followed by the Board, the issues it considered, the object of its inquiry, or its standard of proof. At the very least, the trial court could conclude that the evidence's potential for prejudice outweighed any probative value. Fed. R. Evid. 403.[7]

Finding no abuse of discretion, the judgment of the district court is

AFFIRMED.

CUDAHY, *Circuit Judge*, dissenting:

I respectfully dissent with respect to the admission of character evidence concerning Deputy Sheriff Riggs. Ostensibly, this evidence was admitted in rebuttal to testimony by plaintiffs' expert that Riggs lacked the necessary training and police skills. But that testimony was

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[7] Neither will we upset the court's directed verdict in favor of County defendants on the wrongful death claim. The jury found for Riggs, concluding either (1) that he was not negligent, or (2) that Clark was contributorily negligent. Either conclusion would foreclose liability against County defendants as well.

relevant *only* to the claim against Marion County, and the rebuttal testimony was admitted *after* a verdict had been directed in favor of the County. Hence, it appears that the evidence could only have been introduced to show that Riggs acted in conformity with his character on the night in question. This would perhaps not be a serious enough problem to merit reversal were it not for the exclusion of the disciplinary report which concluded that the officer had acted unreasonably. Certainly the trial judge has substantial discretion with respect to the admission of evidence but here the cumulative effect of these evidentiary rulings unfairly handicapped the plaintiffs.